No. 89-1681 (2)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BOARD OF EDUCATION OF TOPEKA,
SHAWNEE COUNTY, KANSAS,

Petitioner,

—v.—

OLIVER BROWN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

This is an historic case. It was in this case, in 1954, that this Court declared state-imposed school segregation to be unconstitutional. *Brown v. Board of Education*, 347 U.S. 483 (1954). The following year, the Topeka Board of Education was ordered to desegregate its schools with "all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

Thirty-five years later, in 1989, the court of appeals held that the Topeka School Board had still not completed its task of desegregating its schools. This decision did not break new ground, either legally or historically. Rather, it represented a straightforward application of the repeated and unanimous holdings of this Court to the factual findings of the district court. Moreover, the question of whether a school system that has never had a court-imposed desegregation plan has sufficiently desegregated on its own is, as the court of appeals noted, a "rare" one today. App. 36b. Respondents respectfully submit that the application of settled principles to idiosyncratic facts hardly merits review by this Court.

STATEMENT OF THE CASE

Prior to 1954, Kansas law permitted the state's larger cities to maintain segregated elementary schools. App. 2a, 4b. Topeka chose to exercise that option and provided segregated elementary schools, busing black children from all over the city to four all-black schools. App. 2a, 4b. In 1951, this case was filed, challenging that practice as unconstitutional. App. 2a, 4b.

Both in anticipation of and in response to this Court's decision, the Topeka School Board began to allow some black children to attend previously all-white schools. App. 9a, 5b. By 1956, each school had its own geographic attendance boundary. App. 9a, 9b. At the

end of this process, three of the four previously all-black schools "remained all- or virtually all-black" and two other schools "became more than 20% black in a school district with a black elementary student population of less than 10%." App. 9b. No faculty was desegregated and indeed, "in the years immediately following the Supreme Court decisions the district discriminated in the hiring and placement of minority staff." App. 40a. The district court, in 1955, found that "complete desegregation has not been accomplished . . . ." App. 5a; *Brown v. Board of Education*, 139 F.Supp. 468, 470 (Kansas 1955).[1] In 1989, the court wrote: "One thing is abundantly clear: Creating neighborhood schools in 1954 *did not* integrate the Topeka schools." App. 42b n.49 (emphasis in original).

This case was reopened in 1979 by new named plaintiffs[2] who asserted that Topeka had never completed the process of desegregating its schools. App. 5a, 6b-7b. Trial was held in October 1986. App. 2a. In the trial, and the opinions that ensued, every action taken or not taken by the Topeka School Board from 1951 until 1986 was reviewed. The factual findings of the district court were largely affirmed by the court of appeals. Those factual findings (largely undisputed, App. 44b) included:

School closings. All four all-black schools have been closed. App. 9a, 10b. The district court found that when they were closed, the School Board assigned most or all of the students to the "nearby schools with higher

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[1] The district court made that holding even though its interpretation of the law at the time did not require that segregation be eliminated "root and branch" and excused the continued existence of the all-black schools. App. 4a-5a.

[2] The original first named plaintiff was Oliver Brown on behalf of his daughter Linda. The first named intervenor was Linda Brown Smith on behalf of her children Charles and Kimberly. App. 7b n.3.

than average minority populations," making them disproportionately black. This "aggravated the imbalance of nearby schools." App. 37a, 39b. The court of appeals affirmed. It found that during the 1950's and 1960's, "school closings of highly segregated schools were not desegregative in practice because the school district simply reassigned the students at those schools *en masse* to a nearby school which then took over the segregated status of the school closed." App. 80b.[3] Highland Park North, Lafayette, and Quinton Heights are all disproportionately black as a result of reassignment of students from previously disproportionately black schools that were closed. App. 34a-36a, 83b-86b.

School openings. The district court found that "the construction of [new] schools, particularly on the west side of this district, appears to have promoted racial separation . . . ." App. 27a, 39b. The court of appeals affirmed, noting that school construction "had a significant segregative effect on the district . . . [T]he school district did nothing to diminish the segregative effect of those schools . . . [S]chool openings . . . worked to increase segregation." App. 78b-79b, 10b, 13b.

School boundaries. The district court found that "[t]he boundaries set around the former *de jure* black elementary schools after this case was remanded by the Supreme Court appear to have perpetuated the racial identity of those schools." App. 29a, 39b. The court of appeals affirmed. App. 75b. The district court found that the Lowman Hill school was and had been since before 1954 a disproportionately minority school with attendance boundaries drawn to encompass the only "historically black residential areas" in the area, bounded by disproportionately white schools. App. 30a-31a. The court of appeals affirmed. App. 58b n.62, 76b-77b. The

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[3] The court found that in the 1970's, school closings were neither segregative nor desegregative. App. 80b.

district court found that Quinton Heights was a disproportionately minority school next to a much whiter school. App. 51a-52a. The court of appeals affirmed. App. 75b. The court of appeals also noted that the School Board's expert had testified to at least one boundary change that had an inexplicably segregative effect. App. 61b, 76b. The court of appeals concluded that "in the past, the school district drew boundaries with significantly segregative effects," App. 75b, "which the school district has never undone." App. 77b.

Optional attendance zones. The district court found that optional attendance zones used by the school district had a "slight" segregative effect. App. 23a. The court of appeals affirmed. App. 61b.

Additions. The district court found that in some cases, additions were made to white schools to add capacity at a time when space was available at black schools. App. 24a. The court of appeals affirmed. App. 61b, 40b.

Alternatives. The district court found that the School Board could have made school siting decisions that would have achieved greater desegregation, but chose not to. App. 28a-29a, 40b. The district court also found that the district had refused to adopt several building plans that would have enhanced desegregation. App. 52a-53a, 40b. The district court concluded that "[a]t any time, more could have been done to achieve racial balance in the schools." App. 54a. The court of appeals affirmed these findings and strongly emphasized the district's failure to take advantage of opportunities to desegregate. App. 89b-94b, 58b-72b, 81b-89b. It said:

> What Topeka did not do is actively strive to dismantle the system that existed. It opened and closed schools with little or no thought given to the effect of such actions on segregation, and ob-

> served the segregative or desegregative effects of such actions with indifference.

App. 94b.

Faculty and staff. The district court found that faculty were disproportionately assigned by the School Board on the basis of race. It held that black and minority staff have been and are disproportionately assigned to schools that are disproportionately black and minority by student assignment. App. 40a-43a. The court of appeals affirmed. App. 72b-74b, 49b-57b. It found a "long-standing pattern of imbalances coupled with the tracking of student assignment percentages . . ." App. 73b.

Present Conditions. In addition to examining the actions and inactions of the School Board over the last 30 years in Topeka, both courts examined the present student and faculty assignment patterns to determine whether segregation persists in the Topeka schools. In that regard, the district court found that there remain schools in Topeka that are racially identifiable as either black or white by student assignment using any of the generally accepted methods of analysis. App. 16a. The court of appeals affirmed. App. 47b-49b.[4] The district court also found and the court of appeals affirmed, as previously noted, that minority faculty are disproportionately assigned to schools identifiable as minority by student assignment. App. 40a-43a, 72b-74b, 49b-57b. On the basis of these findings, the court of appeals observed that where student assignment and faculty assignment

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[4] By the most common measure, approximately half of the schools are racially identifiable by student assignment. *Compare* App. 47b-49b (standard of plus or minus 15%) with App. 12b n.8 and 15b n.13 (school populations). "Even under the most generous of these numerical standards, proposed by the school board's expert, there are six elementary and three secondary schools that are racially identifiable by student assignment." App. 49b.

"vary [by race] together, as they do in Topeka, leading to schools that are noticeably more white or more minority in both students and faculty, it is difficult to posit a neutral explanation. The school district has not attempted to provide one." App. 54b-56b (footnote omitted). Finally, the court of appeals summarized its conclusions by noting that "schools [in Topeka] that are marked as white or minority by their students and faculty/staff are also so marked by their geography, the residential population in their attendance areas, and by their history." App. 56b.[5]

Notwithstanding their general agreement on facts, the district court and the court of appeals reached dramatically different legal conclusions. The district court found that "[t]he district has a unitary system of education." App. 61a. The court of appeals found that "there is a current condition of segregation in Topeka." App. 94b.

These different conclusions can be explained by two of the district court's legal rulings, which the court of appeals later found erroneous. First, the district court ruled that Topeka's failure to desegregate was excused because, in the early 1950's, the school district adopted a

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[5] Because of these factual findings, it is not accurate to argue, as the School Board does, that this is a case of a school board that did everything it could to desegregate but was overwhelmed by demographic trends outside its control. Pet. 14-15. To the contrary, the district court found, and the court of appeals agreed, that demographic trends in Topeka have been desegregative and the most that can be said of the School Board is that it "has not bucked the demographic forces that have improved the racial balance of schools." App. 54a, 8b, 59b, 62b, 64b-65b. In any event, a school district that has not been declared unitary has a continuing obligation to respond to segregative demographic changes. App. 65b-66b; *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 20-21, 28 (1971); *Keyes v. School Dist.*, 413 U.S. 189, 201-204 (1973); *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 459-61, 465 n.13 (1979); *Flax v. Potts*, 464 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1007 (1972).

neighborhood schools system. *See e.g.*, App. 18a. Thus, the district court excused use of additions to overcrowded white schools that contributed to segregation in the name of "neighborhood" schools. App. 24a. It excused the siting, opening and maintenance of all-white schools as "consistent with the race-neutral neighborhood school concept." App. 27a. It excused a disproportionately black school surrounded by disproportionately white schools because the boundaries of the schools "for two decades have been consistent with the neighborhood school concept." App. 31a. It excused the reassignment of black students from disproportionately black schools being closed to other disproportionately black schools, rejecting redistribution to adjacent white schools, on the rationale that this would "diminish the advantages of neighborhood schools." App. 32a. And it repeatedly excused the failure to take actions that would have desegregated the schools, even without busing, as inconsistent "within the framework of smaller neighborhood schools." App. 52a. In short, the district court believed that the school district had fulfilled its duty to desegregate when it had adopted and adhered to a neighborhood schools policy. App. 40b and n.48.

The court of appeals disagreed. App. 39b-43b, 31b-33b. Citing this Court's holding in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28 (1971), that "'racially neutral' assignment plans proposed by school authorities to a district court may be inadequate," App. 41b, the court of appeals held that "[m]ere adherence to a race-neutral but ineffective neighborhood school plan is insufficient." App. 43b. *Keyes v. School Dist.*, 413 U.S. 189, 212 (1973).

Second, the district court found that plaintiffs had to show that actions taken by the School Board between 1951 and the time of trial were intentionally segregative. *See* App. 24a ("it has not been shown that space additions were *intentionally* used to promote segre-

gation . . ."); App. 27a ("the court does not believe that the district's school construction policy was *intended* to maintain or promote segregation"); App. 53a ("[n]o evidence established that . . . the failure to implement the plans was racially motivated"); App. 60a-61a ("[t]he racially imbalanced schools are not the product of overt or covert *intentional* segregative conduct")(emphases added).

The court of appeals again disagreed. App. 38b-43b, 23b-31b. It held that the district court "focused too greatly on the school district's lack of discriminatory intent," App. 38b, and quoted this Court's opinion in *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 538 (1979), that "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." App. 43b. As explained by the court of appeals, "[a] lack of intent is therefore insufficient" to meet the school district's constitutional obligation. App. 43b. *See also* 34 C.F.R. §100.3(b)(3), (6)(i) (under Title VI regulations, the applicable standard is the effect of the school board's actions).

Based upon these legal errors, the court of appeals reversed. It found that the findings of the district court concerning the actions and inactions of the school district led to the "definite and firm conclusion that the district court erred when it found the Topeka school system to be unitary." App. 95b.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW REPRESENTS A STRAIGHTFORWARD APPLICATION OF WELL-SETTLED PRINCIPLES AND THEREFORE RAISES NO NEW ISSUES OF LAW

A. The Legal Standard Applied By The Court Below Was Derived Verbatim From This Court's Decisions

The School Board does not defend the erroneous legal conclusions of the district court. Instead, it complains that the court of appeals improperly considered whether the School Board had made "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Pet. 18. As even petitioners recognize, however, that standard is taken verbatim from this Court's unanimous decisions on school desegregation and has been consistently applied by the lower courts in school desegregation cases for the past twenty years.

The School Board attempts to distinguish those decisions by arguing that "[t]his is a liability case, not a remedy case." Pet. 23 n.20 (citation omitted). However, the notion that the Topeka School Board has never been found liable for segregating its schools must rank as one of the most unusual and meritless arguments presented to this Court. This Court need hardly be reminded of its decision holding the Topeka School Board liable for intentionally segregating its schools. *Brown v. Board of Education*, 347 U.S. 483 (1954). As the court of appeals noted: "This is not a *liability* case in which plaintiffs must prove that the school board has committed unconstitutional acts; that was established in 1954." App. 27b, 42b n.49 (emphasis in original).[6]

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[6] As the School Board concedes, even if this were a liability case, it (continued...)

More than a generation later, the dispute between the parties focuses on whether or not the schools of Topeka have been effectively desegregated in compliance with this Court's historic mandate. *Brown v. Board of Education*, 349 U.S. 294 (1955); App. 26b-27b. It was in exactly that context that this Court unanimously ruled that "[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Bd. of School Comm.*, 402 U.S. 33, 37 (1971)[7] In particular, the *Davis* Court held that "'neighborhood school zoning,' whether based strictly on home-to-school distance or on 'unified geographic zones' is not the only permissible remedy; nor is it *per se* adequate to meet the remedial responsibilities of local boards." 402 U.S. at 37.

The holding in *Davis*, which was followed by the court below, has been reaffirmed by this Court on at least two occasions. *See U.S. v. Scotland Neck City Bd. of Ed.*, 407 U.S. 484, 490 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 26. In addition, the *Davis* language criticized by petitioners has been applied by at least 8 circuit courts in a manner virtually indistinguishable from the decision of the court below in this case. *Pitts v. Freeman*, 887 F.2d 1438, 1446, 1448 (11th

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[6] (...continued)
would be proper for the court to consider whether the School Board had made efforts "to achieve the greatest possible actual desegregation, taking into account the practicalities of the situation," Pet. 19 n.18, as one factor from which the inference of intentional discrimination could be drawn. *Columbus Bd. of Ed. v. Penick*, 443 U.S. at 461.

[7] The School Board's petition fails to cite *Davis*. In addition, where the petition quotes the use of the cited language by the court of appeals, it notes that the court of appeals is itself quoting another source, but fails to identify that source as a unanimous opinion of this Court. Pet. 18.

Cir. 1989), *petition for cert. filed*, No. 89-1290 (Feb. 12, 1990); *Stell v. Savannah-Chatham Cty. Bd. of Ed.*, 888 F.2d 82, 83 (11th Cir. 1989); *United States v. Pittman*, 808 F.2d 385, 390 (5th Cir. 1987); *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d 1425, 1434 (5th Cir. 1983); *Valley v. Rapides School Bd.*, 702 F.2d 1221, 1229 (5th Cir.) *cert. denied*, 464 U.S. 914 (1983); *Price v. Denison Ind. School Dist.*, 694 F.2d 334, 354, 356-57 (5th Cir. 1982); *United States v. South Park Ind. School Dist.*, 566 F.2d 1221, 1225 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978); *Evans v. Buchanan*, 555 F.2d 373, 379 (3d Cir. 1977); *Liddell v. Caldwell*, 553 F.2d 557 (8th Cir. 1977); *Liddell v. Caldwell*, 546 F.2d 768, 773 (8th Cir. 1976); *Morgan v. Kerrigan*, 530 F.2d 401, 412 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *Keyes v. School Dist. No. 1*, 521 F.2d 465, 477-78, 480 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); *Tasby v. Estes*, 517 F.2d 92, 103 (5th Cir.), *cert. denied*, 423 U.S. 939 (1975); *Arvizu v. Waco Ind. School Dist.*, 495 F.2d 499, 503 (5th Cir. 1974); *Medley v. School Bd. of City of Danville*, 482 F.2d 1061, 1064 (4th Cir. 1973), *cert. denied*, 414 U.S. 1172 (1974); *United States v. Texas Educ. Agency*, 467 F.2d 848, 871 (5th Cir. 1972); *Kelley v. Metropolitan Cty. Bd. of Ed.*, 463 F.2d 732, 744 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); *Harrington v. Colquitt Cty. Bd. of Ed.*, 460 F.2d 193, 196 (5th Cir.), *cert. denied*, 409 U.S. 915 (1972); *Adams v. School Dist. No. 5*, 444 F.2d 99, 100 (4th Cir.), *cert. denied*, 404 U.S. 912 (1971); *Northcross v. Bd. of Ed.*, 444 F.2d 1179, 1183 (6th Cir. 1971).[8]

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[8] The School Board cites four cases to argue that there is a conflict in the circuits concerning use of the cited language. One of those cases is *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987). The School Board then acknowledges that the *Morgan* court did apply the cited language and describes its appropriate use as follows: "[B]ecause in *Morgan* the district sought a determination of unitariness without having fulfilled the specific goals of a court-supervised desegregation plan, the court considered whether maximum practical desegregation had been

(continued...)

Finally, although the court of appeals emphasized the School Board's failure to make every effort to achieve the greatest possible degree of desegregation, that was not the sole basis for the court's decision. The court affirmed numerous findings of the district court that the School Board took actions in the areas of school opening, school closing, attendance boundary setting, optional attendance zones, school additions, and faculty and staff assignment that had the effect of perpetuating segregated schools. *See* pp.2-5, *supra*. Given these findings, the court could not have found the Topeka School Board had completed the process of desegregation even if it had not applied the "greatest possible degree" language of this Court.

For all these reasons, petitioner's Question I does not merit review by this court.

B. The Legal Standards Announced By This Court Were Correctly Applied By The Court Below

Consistent with decisions from this Court, the court of appeals first found that the "plaintiff bears the burden of showing the existence of a current condition of segregation." App. 18b. The School Board does not object to this legal principle, but does argue that in applying it, the court of appeals relied solely on the student and fac-

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[8] (...continued)
achieved, despite such failure." Pet. 19 n.18. In other words, the *Morgan* court, like the court of appeals in this case, considered whether maximum practical desegregation had been achieved in determining whether the school district had fulfilled its mandate to desegregate. Not only does *Morgan* not conflict with the holding in this case, it is identical. 831 F.2d at 322-25. None of the other cases is inconsistent with the court of appeals' decision in this case. *See e.g., Jacksonville Branch NAACP v. Duval Cty. School Bd.*, 883 F.2d 945, 950 (11th Cir. 1989)(discussing alternatives not taken as a factor in determining unitary status).

ulty assignment statistics. Pet. 22. The short answer to that contention is that the court of appeals did not rely solely on student and faculty assignment statistics, even though it did find those statistics incapable of a neutral explanation. App. 55b.[9] The court also examined all of the facts outlined above and those suggested by the opinions of this Court to determine the current degree of segregation. App. 22b, 58b-94b. *Green v. School Bd.*, 391 U.S. 430, 442 (1968); *Keyes v. School District*, 413 U.S. at 196, 201-22; *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 18.

Next, the court of appeals found that "[once] a plaintiff has proven the existence of a current condition of segregation, the school district bears the substantial burden of showing that that condition is not the result of its prior *de jure* segregation." App. 23b. This time, the School Board concedes, as it must, that this burden shifting is required by this Court. Pet. 23. *Green v. School Board*, 391 U.S. at 439; *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. at 537-38; *Keyes v. School Dist.*, 413 U.S. 189, 209-11 (1973).

The School Board nonetheless argues that the burden established by this Court for all school desegregation cases should not be applied in this case for three reasons. First, the current condition of segregation is, in the school district's opinion, not "significant." Pet. 24.

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[9] This Court has often examined statistics concerning student assignment and faculty assignment as one measure of the effectiveness of a school district's desegregation plan. *See e.g., Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1; *Davis v. Bd. of School Comm.*, 402 U.S. 33 (1971). It is true that "any particular degree of racial balance or mixing" is not required "as a matter of a substantive constitutional right," *Swann*, 402 U.S. at 24, but that does not mean that statistics may not be used as the court of appeals did in testing the adequacy of the School Board's efforts to desegregate.

However, the court of appeals found to the contrary. 45b-57b.

Second, the School Board argues that the burden shifting is inappropriate here because so much time has passed. Pet. 24-25. However, this Court has explicitly rejected this argument. *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. at 537; *Keyes v. School District*, 413 U.S. 189, 210 (1973); App. 29b. *See also Green v. School Bd.*, 391 U.S. at 438.

Finally, the School Board argues that the burden shifting is inappropriate because the court of appeals, in determining whether the School Board had met its burden, considered whether the school district had made "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Pet. 25-28. In other words, the School Board's second Question Presented turns out, on careful reading, to be no more than a restatement of the first Question Presented and is unpersuasive for the same reasons. Section IA, *supra*. It does not merit review by this Court.[10]

II. THE PETITION IN THIS CASE CAN BE DENIED WITHOUT AWAITING A DECISION IN *BOARD OF EDUCATION v. DOWELL*, NO. 89-1080, WHICH RAISES ENTIRELY DIFFERENT LEGAL ISSUES

This Court has granted a petition for *certiorari* in *Board of Ed. v. Dowell*, No. 89-1080. The School Board

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[10] The third Question Presented by the School Board suggests that the court of appeals gave insufficient weight to the factual findings of the district court. But, as noted above, the court of appeals largely affirmed the factual findings of the district court. It reached a different result because of errors of law by the district court that the School Board here does not even attempt to defend.

concedes that *Dowell* raises different issues than those raised by this case and the decision in *Dowell* will have no effect on this case. Pet. 14. That concession is correct.

In *Dowell*, the school district put in place a plan that desegregated the schools. *Dowell*, 890 F.2d 1483, 1486 (10th Cir. 1989). The district court then declared the district unitary. *Id.* Seven years later, the school district sought to alter the plan. The question presented by *Dowell* is what standards should be used to measure school board actions that resegregate the schools after a finding of unitariness. Here, by contrast, the question is whether the Topeka school district is unitary in the first place, not what latitude it has to take actions after having been found unitary. Thus, the decision in *Dowell* will not affect the holding in this case and there is no reason to hold this petition until the ruling in *Dowell.*

Topeka's black children have been waiting for more than 35 years for complete desegregation. The wait should end. The petition should be denied so that the parties and the district court can devise a remedy that will finally comply with the order this Court issued 35 years ago.

CONCLUSION

For all these reasons, respondents respectfully ask that the petition be denied.

Respectfully submitted,

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